No. 86-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHAMPION INTERNATIONAL CORPORATION,

Petitioner,

v.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 5-376,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION, AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Can a prevailing civil rights defendant recover expert witness fees as part of costs absent adherence to the standards of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), when Congress deliberately incorporated such expenses in the fee shifting scheme of the civil rights acts?

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Interest of Amici*

* Letters of consent to the filing of this brief from counsel for the petitioner and the respondents have been filed with the Clerk of the Court.

The NAACP Legal Defense and Educational Fund, Inc., [LDF] is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee has, over the past twenty-four years, enlisted the services of well over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The American Civil Liberties Union is a non-partisan organization of over 250,000 members, dedicated to defending the fundamental liberties guaranteed in the Bill of Rights. Toward that end the ACLU has acively represented aggrieved plaintiffs before this Court and in the lower federal courts. The continuing availability of attorneys fees and the related costs of complex and important constitutional litigation is of crucial concern to the ACLU and its continued defense of civil liberties.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization founded in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics in the United States.

Attorneys for amici have handled

cases involving the broad range of civil rights litigation. Amici have also participated in many of the leading cases involving attorneys' fees questions, both as counsel and as amici curiae,[1] and have provided testimony before Congress on the need to award fees and costs in civil rights cases and on the standards that should govern awards.

The issue raised on this appeal concerns the standards to be applied in awarding costs to successful civil rights litigants and will affect the entire

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[1] E.g., Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Hutto v. Finney, 437 U.S. 678 (1978); Johnson v. Georgia Highway Express Co., 488 F.2d 714 (5th Cir. 1974); Christiansburg Garment Co. v. Equal Employment Opportunity Comm., 434 U.S. 412 (1978); Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886 (1984); City of Riverside v. Rivera, 477 U.S. ___, 91 L.Ed.2d 466 (1986)

spectrum of civil rights litigation.

SUMMARY OF ARGUMENT

The district court and the panel of the Fifth Circuit correctly ruled that petitioner could not recover expert witness fees as part of its costs. The en banc Court reached the same result, but for manifestly the wrong reason. The basis of its decision would not only cripple the private enforcement of the civil rights laws but is also contrary to the clear intent of Congress.

This case turns on the application of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 [the Act] and the parallel provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k): Whether Congress included expert witness fees as part of "attorneys' fees and costs" in the fee shifting scheme of those Acts. The

decision in this case will materially affect the ability of private litigants to vindicate the rights secured by the broad range of civil rights legislation. If plaintiffs in civil rights cases cannot recoup the substantial expenses incurred in retaining necessary expert witnesses, they will be economically barred from effectively pursuing their statutory and constitutional rights. Conversely, if unsuccessful civil rights plaintiffs can be saddled with their opponents' often substantial expert witness fees, then good faith litigation will be deterred rather than encouraged as Congress intended.

A careful analysis of the legislative history of the Act reveals that Congress was aware that the economic barriers to private enforcement of these rights included not just the inability of

litigants to pay attorneys' fees, but also the other costs of efficacious litigation, including the significant and sometimes prohibitive expense of expert testimony. Congress was concerned about the disparity in litigating strength between civil rights plaintiffs and their typically more wealthy opponents, such as public corporations and local governments.

In legislating, Congress carefully crafted a statute that included expert witness fees as part of attorneys' fees when plaintiffs won and -- by adopting the Christiansburg standard -- shielded good faith but unsuccessful plaintiffs from bearing such large fee. It did this by incorporating and endorsing the prior case law that had included expert witness fees as part of "attorneys' fees" to be covered in the fee shifting provisions of

the Act. It made this clear by tracking of the language of prior attorneys' fees statutes and explicitly incorporating of the case law under those statutes; by explicitly adopting to the "private attorney general" line of cases; and by citing as illustrative cases that had awarded expert witness fees.

Moreover, the legislative debates make clear that proponents and opponents of the bill alike understood that the "attorneys' fees" covered by the Act's fee shifting scheme included a broad range of recoverable out-of-pocket expenses, such as expert witness fees, not traditionally recoverable as "costs" under the American Rule.

This Court should affirm the manifested intent of Congress. A contrary ruling would subvert the underlying purpose of the Act. Congress passed the

Act to encourage citizens to vindicate their rights in the courts, and to enable them to do so effectively. If expert witness fees could be imposed on losing civil rights plaintiffs absent the protection of the Christiansburg standard, these plaintiffs will simply be forced out of the courts. More importantly, if the en banc court's reasoning is left intact and expert witness fees were not recoverable, they could not be borne by the often indigent plaintiffs.

Nor could the cost of experts be met from the attorneys' fees. These fees are based only on reasonable hourly charges calculated to parallel market rates. If these fees were diminished by the expense of employing experts, they would not be adequate to attract competent counsel as Congress intended. The result of not

recognizing that expert fees were included in fee-shifting will be: that cases will not be presented effectively; that attorneys will not be willing to undertake representation; or that plaintiffs will be deterred from suing in the first place. Any of these would defeat the very purpose of the Act.

ARGUMENT

I. CONGRESS INCLUDED EXPERT WITNESS FEES AS PART OF ATTORNEYS' FEES UNDER THE CIVIL RIGHTS STATUTES AND, THEREFORE, THE SPECIFIC STANDARDS GOVERNING FEE SHIFTING UNDER THOSE STATUTES MUST CONTROL

Champion rests its entire argument on the equitable discretion said to be conferred on the district courts by F.R.C.P. 54(d). Putting aside the question whether Rule 54(d) was in fact intended by its drafters to confer such discretion,[2] it cannot possibly support Champion's position in this case. For Rule 54(d) contains a very explicit disclaimer. Its authorization of the

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[2]It is the position of amici that Rule 54 was not so intended. Henkel v. Chicago, St. Paul, M. & O. Ry. Co., 284 U.S. 444 (1932). Thus we agree with the arguments made by respondents in the companion case of Crawford Fitting Company v. J.T. Gibbons, Inc., No. 86-322. As detailed in the text, however, the specificity of the civil rights fee shifting scheme makes the question irrelevant to decision in this case.

district courts to act with respect to costs was never intended to supplant specific congressional schemes with respect to fees and costs; the rule applies to all situations "[e]xcept when express provision is made . . . in a statute of the United States . . . ." Id.

It is our contention, which we document below, that §1988 is just such an explicit statutory scheme. Congress deliberately included expert witness fees in the fee shifting scheme of the civil rights statutes so that successful plaintiffs would be able to recover these otherwise onerous litigation expenses and so that unsuccessful, good faith, civil rights plaintiffs would be shielded under the standards of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (Title VII), and Hughes v. Rowe, 449 U.S. 5

(1980) (§1988), from bearing their opponents' expert expenses.

Amici, therefore, support the result reached by the court below: the prevailing defendant in this civil rights action may not receive expert witness fees and other expenses as part of an award of costs because the district court specifically held that plaintiffs acted in good faith and that the defendants had not met the Christiansburg standard. But we urge that the basis for the en banc court's decision is manifestly incorrect and that this Court should explicitly affirm the judgment denying costs on the basis of the district court and the Fifth Circuit panel's decisions: that the district court was correct when it held that Christiansburg was not satisfied because this action was not frivolous, unreasonable, or without foundation, nor

was it brought in bad faith.

In the remainder of this brief, amici address solely the issue of the inclusion in attorneys' fees of expert witness and other litigation costs and show that the court of appeals erred in concluding that expert witness fees are not recoverable as part of "attorneys' fees and costs" under 42 U.S.C. §§ 1988 and 2000e-5(d). We first show that Congress specifically considered this question when it deliberated and formulated the fees Act in 1976. We then show how Congress specifically acted to include expert witness fees in the Act's coverage. Finally, we demonstrate that any contrary conclusion would not only run afoul of Congress's clearly manifested intent, but also would undermine the basic purposes of the Act.

II. CONGRESS WAS SPECIFICALLY AWARE OF AND LEGISLATED TO ALLEVIATE THE SIGNIFICANT PROBLEM OF EXPERT WITNESS FEE EXPENSES IN ENACTING THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.

In order better to understand the scope of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 [the Act], it is necessary to review the history of that legislation, including the hearings and events that led to its passage. As early as 1973, the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary held six days of hearings on the problems of economic barriers to citizen access to lawyers and the courts. Of these, two days were spent on the question of modifying the American Rule[3]

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[3] As explicated by this Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975):

> At common law, costs were not allowed; but for centuries in

to allow for the recovery of costs, including attorneys' fees, by the prevailing party in litigation. Great attention was paid to the then mounting case law shifting fees in civil rights and other public interest litigation under the "private attorney general" theory. See The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93 Cong., 1st Sess. 787-88 (1973) (Statement

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> England there has been statutory authority to award costs, including attorneys' fees. . . . "[T]he general practice of the United States is in oposition [sic] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." This Court has consistently adhered to that early holding.

Id. at 247, 249.

of Senator Tunney).

This Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), gave impetus to Congress to fashion a statute that would shift fees in some cases. The Senate Judiciary Committee reported out two identical bills that provided for the shifting of fees in civil rights litigation, the first as part of the renewal of the Voting Rights Act in 1975, See Pub. L. No. 94-73 §402, 42 U.S.C. §1973; [1975] U.S. Code Cong. & Ad. News 774, and the second, S.2278, which eventually passed as §1988.[4] On the

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[4]Civil Rights Attorney's Fees Awards Act of 1976, Source Book: Legislative History, Texts, and Other Documents. Committee Print Prepared By The Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate (1976), p. 5. This Committee Print collects the Senate and House reports and the proceedings and debates in both Houses. It will be cited throughout as "Legis. History ____."

House side, the Subcommitee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary held three days of hearings on various attorneys' fees statutes which resulted in the reporting out of a bill, H.R. 15460, which later passed as §1988. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 3-4 (1976). Legis. History 211-212.

The record before Congress in these hearings established that the economic deterrents to civil rights enforcement, and public interest litigation generally, included both the problems of attorneys' fees and the great expense of expert testimony. Each of the first three witnesses in the 1973 Senate hearings raised this problem. One of these was Dennis Flannery, one of plaintiffs' counsel in Alyeska. He testified

regarding the unique effects of economics on the public interest lawyer:

> When a big case such as this comes into a private law firm, ... expert witnesses are contacted, fee arrangements are made so that the expert witness can give his full attention to the case during the time he is needed, research is undertaken in a variety of areas (even areas that are tangential to the lawsuit, just to make sure you have covered every aspect). . . .
>
> Now, when a public interest firm is involved, or when a group of citizens or even an individual citizen decides to take on a big case and to present the views of the other side in a big case . . . . there is simply no money up front. . . . .[T]here is very little money for such essential things as, for example, expert witnesses. And so what I found . . . was that I did not have any money at all to pay any expert anything. And so basically what we had to do was to write or telephone around the country with our hat in our hands asking university people to give us assistance and to take some time off from their heavy class workload and give us whatever assistance they could. But at no time could we actually say to an expert, for example, give us three weeks, we want you down here in Washington, we want to go over this technical material with you, we want you to be

> prepared to be a witness at trial, if we go to trial, and we realize this takes a lot of time and we will pay you a fee. This is precisely what the other side was doing. But, we could not do that . . . .
>
> As a result, the public interest lawyer must pare off very important issues -- that might even be winning issues -- simply because they are either too technical or too big, or require too much expenditure of money.

Senate Hearings, supra, at 832-34 (Statement of Dennis Flannery). Senator Tunney, the chairman of the subcommittee and later the sponsor of S.2278, was clearly impressed by the scope of this problem, referring to it several times in the course of the hearings. See id. at 1108, 1127, 1128.[5]

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[5] At one point, Senator Tunney referred to Flannery's testimony

> that in a difficult case it cost tens of thousands of dollars to be able to conduct the case including being able to get expert witnesses. . . . .

Senate Hearings, supra, at 1108.

This record was repeated in the House. One witness testified about a party having "to confine its activities to cross-examination of industry witnesses because it could not possibly afford to put on expert witnesses of its own. . . ." Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the Comm. on the Judiciary, House of Representative, 94th Cong., 1st

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As indicated in the text, other witnesses before the subcommittee raised the problem of expert witness fees. J. Anthony Kline, the lawyer in La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D.Cal. 1971), one of the earliest "private attorney general" cases, described this imbalance in similar terms. Senate Hearings, supra, at 799. Another witness described the expenditure of $20,000 in expert witness fees which was recouped under the "private attorney general" theory as part of fees and costs in Pyramid Lake Pauite Tribe v. Morton, 360 F. Supp. 669 (D.D.C. 1973). Senate Hearings, supra, at 812, 816.

Sess. 159 (1975). (Statement of Peter H. Schuck, Consumers Union Inc.). Others, representing the Lawyers' Committee for Civil Rights Under Law, told of

> countless other cases that really ought to be brought because they represent a situation in which a statute is not being enforced, but in which they cannot be brought because there is no lawyer for them or because a lawyer might be willing to take the case, but cannot afford even the out-of-pocket expenses.

Id. at 100 (Testimony of Armand Derfner and Mary Frances Derfner, Lawyers' Comm. for Civil Rights). This testimony highlighted the importance of expert witness fees:

> These . . . attorneys -- private practitioners . . . -- face an additional problem: because of the limited resources available to them in public interest cases, they are rarely able to afford the technical assistance of expert witnesses. . . .

Id. at 89.[6] One witness went so far as to state that if expert witness fees were not included, "the very point of the bills may be defeated." Id. at 136 (Statement of John M. Ferren).

In the hearings that led to the enactment of §1988, Congress was consistently asked to respond to this Court's ruling in Alyeska invalidating the "private attorney general" line of cases.[7] Several witnesses referred to the

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[6]They added:

> When Congress calls upon citizens ... to go to court to vindicate its policies and benefit the entire nation, Congress must also ensure that they have means to go to court and to be effective once they get there.

Id. at 90.

[7] Mr. Derfner testified on behalf of the Lawyers' Committee that:

> In that light, I would like to speak just for a second about one specific bill before this committee

Final Report of the American Assembly on Law in a Changing Society which was convened by the American Bar Association.

> which I think does deserve a great deal of attention, and which ought to be given priority consideration: H.R. 9552, introduced by Congressman Drinan. This is a civil rights provision. It deals with specific statutes that would be covered in specific types of cases. It takes up the area that was most damaged by the Alyeska decision because it is in the civil rights area that the Alyeska decision had its most damaging effect.

House Hearings, supra, at 95-96. Congressman Danielson noted the piecemeal nature of the process:

> I have a feeling we are commencing on what is going to be a . . . quite a bit of legislation before it is done, and that may take about 10 years. We will probably have to do as Mr. Crane suggested and take care of the more immediate needs to start with.

Id. at 78. Mr. Derfner later acknowledged the importance of modifying 28 U.S.C. §2412 to shift fees when the government has brought a frivolous case, id. at 101, which was the next area in which the Congress acted. Equal Access to Justice Act, Pub. Law No. 96-481 §204a, 94 Stat. 2327 (Oct. 21, 1980).

It recommended "[e]nactment of legislation permitting courts . . . to award attorneys' fees and expert fees," noting civil rights as an important area of concern and stressing that "[p]recisely this kind of remedial legislation is what is urgently needed at this time." House Hearings, supra, at 67, 126 (1975) (Statement of Charles R. Hobbs on behalf of the American Bar Association Special Committee on Public Interest Practice and Statement of Charles R. Halpern, Exec. Dir. Council for Public Interest Law).[8]

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[8]While the report spoke of a statute that would apply to all public interest litigation, these witnesses observed that

> it makes sense to concentrate on those areas where the need is most dramatic. We concur with Father Drinan in his H.R. 9552, that the civil rights area is one where there is an urgent need for prompt legislation to permit attorneys' fee awards in cases to enforce the civil rights laws.

The manifest concern about expert witness fees was part of a broader concern for equalizing the resources of the parties in civil rights cases. In the Senate hearings, one witness characterized public interest litigation as a battle

> between David and Goliath. In this battle, however, Goliath holds the slingshot as well as the weight advantage...
>
> It is important, I believe, to emphasize here, that neither corporations nor the law firms that represent their interests need be the least bit defensive about leaving no stone unturned in putting forward their best possible case. Indeed, the adversary system, not to mention the canons of legal ethics, demands no less. The problem is that under present circumstances the corporation's citizen interest adversaries cannot devote anything approaching a comparable expenditure of resources to the development of their side of the case.

Senate Hearings, supra, at 841. The ABA

Id. at 125.

testified before the House subcommittee about:

> the need of the public to have both points of view properly represented. When the Government is involved, it is going to give a good run to its point of view. But too many cases have been decided by default, the failure to have a good presentation on the part of the other side.

House Hearings, supra, at 79 (Statement of Charles A. Hobbs, Member, Special Committee on Public Interest Practice of the American Bar Association). relative to the civil rights plaintiff, the

> opposition frequently has virtually unlimited resources, often including expert outside counsel. A federal, state, or even local agency defendant can draw upon the public treasury, and call upon full-time research assistants, the Federal Bureau of Investigation or state or local law enforcement investigators, and the myriad of support services which exist for the use of those agencies. Corporate litigants likewise often have vast resources, subsidized by tax deductions, with which to resist public interest claims. the result is that, especially in the larger public interest case, the sides become extremely unequal. This fact

> subverts the American system of justice, where two equal sides are expected to face one another in a vigorous adversary procedure ...

Id. at 89-90 (Statement of the Lawyers' Committee for Civil Rights Under Law). Congressman Danielson of California, a member of the subcommittee, put it graphically:

> [T]here ought to be a balancing of the power in our court. It seems to be fundamentally unfair that one party is the Government with also unlimited resources, funds, personnel, availability of records, availability of investigating personnel, and whatnot; on the other hand you have the private citizen. What was that thing twisting slowly in the wind? He is out there all alone anyway and it is chilly out there financially.

Id. at 61.

Compounding this problem is the fact that, in addition to their already greater resources, civil rights defendants were able to underwrite these extensive defenses with what is in fact public money. This is obvious in the

case of governmental defendants, who are paying litigation costs out of tax money -- including the taxes paid by plaintiffs and their families. In the case of corporations,

> public tax dollars are in a very real sense being used to support that litigation. The corporation's litigation expenses, its attorneys' fees, its court costs and all costs connected with the litigation are deductible from the corporation's income tax. and that is win or lose, frivolous or nonfrivolous, meritorious or nonmeritorious. So you really have a built-in beginning that one side that is litigating the kind of issues I am talking about is already being supported by public funds.

Id. at 835-36 (Flannery Testimony). Accord id. at 850 (Testimony of Joseph N. Onek, Director, Center for Law and Social Policy);[9] id. at 861 (Derfner Statement);

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[9]Even fee shifting does not totally redress this imbalance, as he noted:

> Furthermore, the Government exercises no control over the expenses it will subsidize. If General Motors chooses to pay its

House Hearings, supra, at 161 (Onek Statement).[10]

It was this precise testimony that Congress heeded when it considered and passed § 1988.[11]

> lawyers $200 an hour the Government still pays one-half. If General Motors pays its lawyers to eat in the best restaurants and stay in the finest hotels, that is okay -- Uncle Sam is going to pay half of it, no questions asked. This is totally different from any kind of fee award system we might have. Under an attorneys' fee statute the courts would exercise control over attorneys' fees and other costs of litigation.

Id.

[10]Corporate civil rights violators can also pass on the costs of their legal defense to the consumer. Senate Hearings, supra, at 861 (Derfner Statement). See also House Hearings, supra at 861 (Testimony of Reuben B. Robertson, III, Public Citizens Litigation Group).

> [11] Representatives of the Lawyers Committee on Civil Rights Under Law, the Council for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses practicing

It specifically implemented the policy of equalizing the resources of the parties when it adopted a different standard for fees to a prevailing defendant. See generally Christiansburg, supra; Hughes v. Rowe, 449 U.S. 5 (1980). Noting that defendants are usually governments, which "have substantial resources available to them through funds

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> in the field testified to the devastating impact of the [Alyeska] case on litigation in the civil rights area .... The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.

H.R. Rep., supra, at 2-3, Legis. History 210-11. The Senate report acknowledged that this testimony "generally confirmed the record presented" at its hearings in 1973. S. Rep., supra, at 2, Legis. History 8.

in the common treasury," H.R.Rep., supra, at 7, Legis. History 215, Congress was concerned that: "Applying the same standard of recovery to such defendants would further widen the gap ... and would exacerbate the inequality of litigating strength." Id.

It is significant that §1988 was the legislative response to Alyeska because it was in the pre-Alyeska civil rights cases that expert witness fees were most consistently awarded.[12] It is well

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[12] See, e.g., Fairley v. Patterson, 493 F. 2d 598, 606 n. 11 (5th Cir. 1974) (costs of preparing reapportionment plan in voting rights case); Welsch v. Likins, 67 F.R.D. 589 (D. Minn.) aff'd, 525 F.2d 987 (8th Cir. 1975) (§1983 suit on rights of mentally retarded); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), aff'd in part, rev'd in part, 516 F.2d 1251 (5th Cir. 1975) (employment discrimination suit under Title VII and §1981: attorneys' and expert witness fees awarded under both Title VII and "private attorney general" theory); La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D.Cal. 1971); Bradley v. School Bd. of City of Richmond, 53 F.R.D.

established that a

> guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

Holy Trinity Church v. United States, 143 U.S. 457, 463 (1892). Here, the very event that precipitated the enactment of §1988, this Court's decision in Alyeska,

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28 (E.D. Va. 1971) (school desegregation); Jones v. Wittenberg, 330 F. Supp. 707, 722 (N.D. Ohio 1971) (jail case); Jackson v. School Bd. of City of Lynchburg, Civ. Act. No. 534 (W.D. Va. April 28, 1970) (school case); Wright v. McMann, 321 Supp. 127 (N.D.N.Y. 1970) (prison case: unpublished decree). See also Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972) (award of attorneys and expert witness fees in voting rights case under "bad faith" exception). La Raza, which involved violations of environmental statutes, was cited by Senator Kennedy during the floor debates as an exalmple of a case "enforc[ing] the rights promised by Congress" that would be covered under S 1988. 122 Cong. Rec. 33314 (1976), cited in Maine v. Thiboutot, 448 U.S. 1, 10 n.9 (1980).

concerned the problem of expert witness fee costs. See discussion, supra, at 19-20 (Statement of Dennis Flannery); see cases cited supra, n. 5. The indivisibility of the attorneys' fees and expert witness fee problem was highlighted "in the testimony presented before the committees of Congress." Holy Trinity Church v. United States, 143 U.S. at 464. Thus, it cannot be assumed that Congress did not intend to include expert witness fees when it enacted §1988. In fact, it is clear from the congressional reports and legislative debates that such expenses were included.

III. CONGRESS SPECIFICALLY INCORPORATED THE PRE-EXISTING CASE LAW THAT INCLUDED EXPERT WITNESS FEES AS PART OF ATTORNEYS' FEES AND COSTS IN ENACTING SECTION 1988

The testimony before the House subcommittee set out the modus operandi that Congress in fact adopted in

restoring the recoverability of fees in civil rights cases.

> The bulk of the nonstatutory private attorney general cases in the past few years were cases under the Civil Rights Laws. These cases, as well as cases under specific attorneys' fee provisions of recent civil rights laws, provided Congress and the courts with a thorough education in attorneys' fees in this area, and resulted in a detailed body of law on technical questions. . . . There is thus a clear record to support the proposition that a generic provision governing the entire area should be superimposed upon the existing patchwork of specific provisions.
>
> One of the bills before this Subcommittee, H.R. 9552 . . . would allow a court, in its discretion, to award attorneys' fees to a prevailing party in suits to enforce the civil rights acts which Congress has passed since 1866. This bill follows the language of section 402 of the Voting Rights Act, and of Titles II and VII of the 1964 Civil Rights Act. All of these acts depend heavily upon private enforcement, and fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate these important Congressional policies.

House Hearings, supra, at 85. (Lawyers'

Committee Testimony).

The committee reports and the legislative debates make clear that Congress used the precise language of Titles II and VII [13] and intentionally

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[13] Because Congress adopted the language of earlier statutes, resort to the "plain meaning" of the words used in §1988 would be particularly inappropriate. See Cannon v. University of Chicago, 441 U.S. 754, 717 (1979), discussed, infra, at p.48.

> To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsman of the statute.

Thus, the fact that Congress did not expressly include expert witness fees, as it did in other statutes, is not controlling. Because Congress legislated in the context of the existing statutory scheme of attorneys' fees provisions, it had to adopt the precise wording of those statutes in order to incorporate the case law and standards developed under those provisions. This Court has on several occasions gone beyond the plain meaning of the statutory language to look to the legislative history of Civil Rights statutes, including §1988, in order to ascertain their correct publication.

Cannon, supra (implied cause of action under Title IX); Hughes v. Rowe, 449 U.S. 5 (1980); Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) (higher standard for award of fees to prevailing defendant).

This conclusion is also reenforced by the legislative history of a later statute which specifically provides for expert witness fees. In 1980, Congress passed the Equal Access to Justice Act, Pub. Law No. 96-481 §204(a), 94 Stat. 2327 (Oct. 21, 1980), amending 28 U.S.C. §2412. This statute provides for fee shifting in cases brought by the United States when its position is not reasonable in law or fact and specifically includes expert witness fees. It is more restrictive than §1988, placing a ceiling on hourly rates (absent special circumstances) and positing a higher standard for recovery of fees. In passing this statute, which was first discussed during the hearings and debates that led to the passage of §1988, n. 7, supra, Congress was aware of the interplay between §2412 and §1988. It specifically provided that, where both apply, the broader provisions of §1988 take precedence because "Congress has indicated a specific intent to encourage vigorous enforcement ...." H.R. Rep. No. 96-1418 at 18, [1980] U.S. Code Cong. & Ad. News 4997. Thus, Congress's explicit incorporation of expert fees in §2412 cannot be read to imply that the failure to include express language to that effect in §1988 indicates a contrary

adopted the prior case law under these statutes and the "private attorney general" theory as recommended at the hearings. As explicated in the Senate Report:

> S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-3 (b) and §2000e-5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. §19731(e). . . . It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, 4 (1976). Legis. History 8, 10.[14]

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intent. Rather, if Congress intended to include expert fees in the narrower statute -- which was designed merely to remove deterrents from contesting unreasonable litigation, then the broader --which was one designed to foster the vigorous assertion of fundamental rights -- cannot be read to exclude it.

[14] The importance of the committee report in establishing congressional intent is well established: "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and

Senator Kennedy, one of the sponsors of the bill, [15] further indicated that the bill "is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the Alyeska decision." Legis. History 23. Similarly, in the House, both Representatives Railsback and Bolling noted that the bill merely codified and restored the pre-Alyeska law. Legis. History 242, 247.

During the floor debate on the House

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studying proposed legislation." Zuber v. Allen, 396 U.S.168, 186 (1969); Thornburg v. Gingles, 478 U.S. ___, 92 L.Ed.2d 25, 42 n. 7 (1986).

[15] In Schwegman Bros. v. Calvert Distillers Corp., 342 U.S. 384 (1951), this Court noted that: "It is the sponsors that we look to when the meaning of the statutory words is in doubt." Id. at 394-95. Since Senator Kennedy's remarks as sponsor are wholly consistent with and complementary to the bulk of the legislative history, they possess added weight.

side, Congressman Drinan, the bill's sponsor and the author of the committee report, [16] amplified on the comments in that report. See H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 5-6 (1976); Legis. History 213-214.

> The Civil Rights Attorney's Fee Awards Act of 1976, S.2278 (H.R. 15460) is intended to restore to the courts the authority to award reasonable counsel fees to the prevailing party in cases initiated under certain civil rights acts. The legislation is necessitated by the decision of the Supreme Court in Alyeska Pipeline Service Corp. against Wilderness Society, 421 U.S. 240 (1975). . . .
>
> Prior to the Alyeska decision, the lower Federal Courts had regularly awarded counsel fees to the prevailing party in a variety of cases instituted under the sections

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[16] Mr. Drinan's exposition is especially authoritative since he was a member "of the House Judiciary Committee responsible for . . . [these] matters, author and chief sponsor of the measure under consideration, and a respected congressional leader in the whole area. . . ." Foti v. Immigration and Naturalization Service, 375 U.S. 217, 23 n. 8 (1963).

> of the United States Code covered by §2278....
>
> The Alyeska decision ended that practice, which this bill seeks to restore. . . .
>
> The language of S.2278 tracks the wording of attorney fee provision in other civil rights statutes such as correction 706 (k) of Title VII -- employment -- of the Civil Rights Act of 1964. The phraseology employed has been reviewed, examined, and interpreted by the courts, which have developed standards for its application. These evolving standards should provide sufficient guidance to the courts in construing this bill which uses the same term. I should add that the phrase "attorney's fee" would include the values of the legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation.

(Comments of Congressman Drinan; Legis. History 252-255 (emphasis added)).

Congressman Drinan's comments are particularly important for two reasons. First, they indicate the explicit intent of Congress in passing the Act to adopt the existing case law under Titles II and

VII. [17] More importantly, they indicate that, in restoring the pre-Alyeska practice Congress was conscious that expert witness fees and other out-of-pocket expenses had been recoverable even though they were not traditional "costs." See cases cited, supra, at n. 12. These non-statutory costs had been treated by the pre-Alyeska cases in just the way Congressman Drinan explained they would be handled under the Act:

> Costs not subsumed under federal statutory provisions normally granting such costs against the adverse party ... are to be included in the concept of attorneys' fees.

Fairley v. Patterson, supra, 493 F.2d at

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[17] Congressman Anderson, one of the floor managers of the bill, also made this point at the opening of the floor debates. Legis. History 236.

606 n. 11.[18]

In 1976 when Congress debated and passed the Act, there was little doubt that expert witness fees had been recoverable under the "private attorney general" cases as discussed above and were recoverable under the attorneys' fees provision of Title VII on which the

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[18] The incorporation of these non-statutory costs as part of "attorneys' fees" is particularly noteworthy in light of the confusion in the cases regarding the effect of 28 U.S.C. §§1920 and 1821 on the recoverability of expert witness fees. Compare Northcross v. Board of Ed., 611 F.2d 624, 642 (6th Cir. 1979) (recoverable under §1920); Keyes v. School District No. 1, Denver Colo., 439 F. Supp. 393, 417-18 (D. Colo. 1977) (same); with Neely v. General Electric, 90 F.R.D. 627 (N.D. Ga. 1981) (not recoverable under §1920); with Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (en banc) (recoverable under §1988); O'Bryan v. Saginaw Mich., No. 79-1297 (6th Cir. Jan. 6, 1981) (same); McPherson v. School District #186, 465 F. Supp. 749, 763 (S.D. Ill. 1978) (same); with Loewen v. Turnipseed, 505 F. Supp. 512, 519 (N.D. Miss. 1981) (recoverable, but theory under which awarded is unclear).

Act was modeled.[19] Indeed, the award of expert witness fees to the prevailing party in Title VII litigation was so well established that it often went unchalleged. Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 at p.5048 ("These charges were not challenged by defendants and are valid"). In innumerable cases, the lower courts had awarded such fees without discussion. See, e.g., Albemarle Paper Co. v. Moody,

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[19] EEOC v. Datapoint, 412 F. Supp. 406, 409 (W.D. Tex. 1976), vacated and rem'd on other grounds, 570 F. 2d 1264 (5th Cir. 1978); Rios v. Enterprise Steamfitters Local, 400 F. Supp. 993, 997 (S.D.N.Y. 1975), aff'd, 542 F. 2d 579 (2d Cir. 1976); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 394 (S.D. Tex. 1974), aff'd in part, rev'd in part on other grounds, 516 F. 2d 1251 (5th Cir. 1975) (After the passage of the Act, Sabala was reversed by this Court on other grounds. 431 U.S. 951 (1977)). See also Sledge v. J.P. Stevens, 12 E.P.D. ¶11,047 (E.D.N.C. 1976) (prospective award of fees for plaintiffs' expert necessitated by defendants' computerized records).

444 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971).[20]

The Senate left little doubt about the case law it intended to incorporate.

> The appropriate standards, see Johnson v. Georgia Highway Express, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D.Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte Mecklenberg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep. No. 94-1101, supra, at 6; Legis. History 12. These cases were carefully chosen to include both statutory -- Davis

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[20] Research reveals no reported pre-1976 Title VII cases in which expert witness fees were discussed and disallowed. For post-Act decisions compare Wheeler v. Durham City Bd. of Ed., 585 F.2d 618 (4th Cir. 1978), with Northcross v. Bd. of Ed. of Memphis, 611 F.2d 624 (6th cir. 1979).

and Swann, supra, -- and non-statutory "private attorney general" -- Stanford Daily, supra, -- fee awards and to include a broad range of attorneys' fee issues: fee computation standards, hourly rates, bonus awards for the continuation of the litigation or excellence of results, expert witness fees, paralegal and out-of-pocket expenses.[21] Davis, in fact, is one of the pre-Act Title VII fee awards which specifically included expert witness fees. And in Swann, more than a third of the $29,972.33 in costs awarded by the district court constituted expert witness fees and expenses.[22]

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[21]This Court has repeatedly noted Congress' citation to these three cases and has relied on them in interpreting the Fees Act. City of Riverside v. Rivera, 477 U.S. ___, 91 L.Ed.2d 466, 480 (1986); Blum v. Stenson, 465 U.S. 886, 893-894 (1984); Hensley v. Eckerhart, 461 U.S. 424, 430-431 (1983).

[22] Amicus NAACP Legal Defense Fund was of counsel in Swann.

Thus, there can be little doubt that Congress acted deliberately and intentionally to incorporate an existing body of case law which clearly allowed for the inclusion of expert witness fees and all manner of reasonable out-of-pocket expenses[23] as part of "fees and costs." [24]

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[23] As phrased by a supporter, Congressman Seiberling: "All we are trying to do in this bill is . . . to get compensation for their legal expenses in meritorious cases." Id. at 245.

[24] Because the legislative history makes clear that expert witness fees, like all other out-of-pocket expenses, are ordinarily recoverable, it would be contrary to the legislative purpose to require a higher standard for the recovery of these expenses. Some of the lower court opinions have been read to require that expert testimony be "vital," "essential," or "helpful and important." See Northcross v. Bd. of Ed., 611 F.2d 624, 642 (6th Cir. 1979); Ste. Marie v. Eastern Railroad Association, 497 F.Supp. 800, 813-14 (S.D.N.Y. 1980), rev'd on other grounds, 650 F.2d 395 (2d Cir. 1981); Keyes v. School District, 439 F.Supp. 393, 418 (D. Colo. 1977). Amicus does not agree with such a reading of these cases. These expenses must

In summary:

> The provision for counsel fees in §1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964....

Hanrahan v. Hampton, 446 U.S. 754, 758 n. 4 (1980).

> The drafters ... explicitly assumed that it would be interpreted and applied as [these provisions] had been during the preceeding twelve years.... It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to [these provisions and the case law], we are especially justified in presuming both that those representatives were aware of the prior interpretation ... and that that interpretation reflects their intent.

Cannon v. University of Chicago, 441 U.S.

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ordinarily be included under §1988, which was intended to encourage vigorous and effective pursuit of one's civil rights, see Pt. IV, infra. Of course, courts always retain the power to disallow an expert expense, or any other, if it is not "reasonable."

677, 696-97 (1979).

IV. TO EXCLUDE EXPERT WITNESS FEES FROM THE PURVIEW OF SECTION 1988 WOULD SUBVERT THE VERY PURPOSE OF THE ACT BY MAKING IT EFFECTIVELY IMPOSSIBLE FOR CIVIL RIGHTS PLAINTIFFS TO BRING MERITORIOUS CLAIMS THAT INVOLVED COMPLEX OR TECHNICAL MATTERS, CONTRARY TO CONGRESS' INTENT

The real issue in this case is what Congress intended in the civil rights fee acts. Thus, whatever standards apply under F.R.C.P. 54(d), §§ 1920 and 1821--including prior approval by the trial judge or findings that the expert testimony was "necessary or helpful ... or indispensable," see Copper Liquor, Inc., v. Adolph Corrs, Co., 684 F.2d 1087, 1100 (5th Cir. 1982) -- they relate not at all to the standards and policies that control decision under § 1988 and Title VII. Congress was concerned with encouraging good faith civil rights litigants to bring suit. Congress was concerned with equalizing the legal

resources available to the parties. Accordingly, it both adopted the prior case law including expert witness fees as recompensable expenses and imposed a stringent standard before these expensive items could be shifted to the unsuccessful plaintiff.

Congress was clear about its purpose in passing the Act: It was "designed to give such persons effective access to the judicial process...." H. Rep. No. 94-1558 at 1; Legis. History 209. As stated by Senator Kennedy: "Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws." Legis. History 197. An important consideration was to provide "fees which are adequate to attract competent counsel...." S. Rep. No. 94-1011 at 6, Legis. History 12; H. Rep. No. 94-1558 at

9; Legis. History 217. The bill's sponsor echoed the testimony given in the House, cited supra, at 22, n. 6:

> When Congress calls upon citizens -- either explicitly or by construction of its statutes -- to go to court to vindicate its policies and benefit the entire Nation, Congress must also insure that they have the means to go to court, and to be effective once they get there.... We cannot hope for vigorous enforcement ofour civil rights laws unless we, in the words of the Knight [v. Auciello] court, "remove the burden from the shoulders of the plaintiff seeking to vindicate the public right." That is what this bill does, and why it is so vital.

Legis. History 200 (Remarks of Senator Tunney).

If expert witness fees had not been included in the fee shifting scheme of the Act, it would have failed in its fundamental purpose to encourage and make effective civil rights litigation. Without the protection of the Christiansburg standard, good faith

plaintiffs would be deterred by the spectre of having to shoulder their opponents' often large expert witness fees. On the affirmative side, civil rights plaintiffs would be deterred because they could not hope to finance the successful presentation of their cases. This would hardly "facilitate and encourage the bringing of actions," particularly in the "typical case," where plaintiffs are indigent and "there is no damage claim from which" to subsidize costs. Legis. History 3 (Remarks of Senator Tunney in introducing the bill). As one witness admonished the House subcommittee, costs "such as expert witness fees and travel expenses", must be included lest

> the very point of the bills ... be defeated for cases in which typical though nontaxabale litigation costs are likely to be heavy, and the plaintiff has no prospect of financing them absent a reasonable

> hope of recovering them from the defendant.

House Hearings, supra, at 136 (Statement of John M. Ferren).

It might be that, if expert witness fees were not recoverable, the necessary experts simply would not be hired. But this would defeat the congressional purpose to provide for effective access to the courts. This was the very point of the witnesses who testified before Congress about the necessity of providing for the recovery of expert witness fees. See supra, Pt. II. In echoing their concern for providing for effective access, Congress should not be presumed to have discarded the substance of that concern.

Finally, there exists a third possible result of not including expert witness fees: that these items of expense would be borne by the attorneys

themselves. But this could not be what Congress intended, for Congress knew that attorneys had been unable to litigate meritorious issues because of their inability to meet these expenses. See Statement of Dennis Flannery discussed, supra, at 19 - 20. Moreover, to expect attorneys to pay these often significant expenses out of the fees awarded would interfere with another of Congress's specific objectives: to provide fees sufficiently high to motivate capable counsel to accept civil rights cases.[25]

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[25]Private attorneys would face two problems. First, the expenses could equal or even exceed any attorney's fee that might be awarded. Indeed, most practitioners would probably prefer not being paid for their time rather than not being reimbursed for out-of-pocket expenses. Second, the advancing of costs without any obligation on the part of the clients to reimburse, would run afoul of ethical rules against maintenance of litigation. See ABA Code of Professional Responsibility, DR 5-103(B). Although the application of such rules to civil rights cases is of doubtful legality (see

Congress was aware that civil rights lawyers were not receiving copious awards under the other fee provisions.[26] These

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NAACP v. Button, 371 U.S. 415, 420 (1963)), the very real threat of a disciplinary proceeding (see, e.g., In re Primus, 436 U.S. 412 (1978)) would be a strong deterrent.

[26] As observed by Senator Kennedy during the debates:

> The Senator from Alabama cannot name one lawyer in this country who has become wealthy because of his work on the protection of the civil rights of this Nation. I ask him to name one -- and his silence in this particular situation, I think, responds full well.
>
> We are not talking about the kinds of attorneys' fees that were included in the antitrust bill. You do not get rich from protecting the civil rights of citizens whether they are in my own city of Boston or in Birmingham.

Legis. History 92. Senator Tunney amplified on this point:

> In fact, a 1975 study undertaken by Leslie Helfman of the Antioch Law School indicates that of the 140 most recent cases decided prior to Alyeska, civil rights cases ranked near the bottom with fees averaging

fees are intended to parallel market rates in an effort to attract counsel. Blum v. Stenson, 465 U.S. 886 (1984). If they were discounted by the cost of expert witnesses, they would no longer be competitive with fees available in commercial and other non-civil rights litigation.

It is important to recognize, as did Congress when it passed the Act, that even with fee shifting the economics of civil rights cases are substantially different than most other areas of practice. Ordinarily, there are no large damage awards from which the client can cover litigation expenses such as expert witness fees. See city of Riverside v. Rivera, 477 U.S. _____, 91 L.Ed. 466

> $37 per hour compared to $181 per hour for the highest ranking field of antitrust law.

Id. at 138.

(1986). Many civil rights cases seek injunctive relief only. Sen. Rep. at 6. Legis. History 12. This is in sharp contrast to cases taken for a contingent fee. In personal injury cases and most treble damage antitrust cases, the damage awards are often large enough for the attorney to pay for large expense items such as experts and still retain a reasonable fee. See Legis. History 200-201 (Remarks of Senator Kennedy). In ordinary commercial cases the fee is based on an hourly rate and the client is billed for expenses such as expert witness fees.

The significance of the expert witness fee issue to the purposes of the Act cannot he overstated: This case will have a significant impact on the entire range of civil rights litigation. And as the decisions of this Court and of the

lower courts demonstrate, civil rights cases often involve complex issues of law and fact.[27] For example, an issue of discrimination in jury selection or some other area might require a statistical expert. See Castaneda v. Partida, 430 U.S. 482 (1977) and Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598, 606 (1986). Voting rights cases require an array of expert testimony covering a variety of matters. Thornburg v. Gingles, 478 U.S. __, 92 L.Ed.2d 25, 48 (1986) ("The investigation conducted by the District

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[27] As this Court has noted, the civil rights statutes and the amendments on which they are based "prohibit sophisticated as well as simple-minded modes of discrimination." Lane v. Walker, 307 U.S. 268, 175 (1969). Cases often require sophisticated proof for "[i]n an age when it is unfashionable . . . to openly express racial hostility, direct evidence of overt bigotry will be impossible to find." United States v. Bd. of School Comm'rs, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S. 824 (1978).

Court into the question of racial bloc voting ... relied principally on statistical evidence presented by [plaintiffs'] expert witnessess ....". And indeed, such testimony is essential to prove the necessary elements of a vote dilution case. Id. at 45-46. School cases often require expert testimony. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 9-10 (1971); Bradley, supra, 53 F.R.D. at 44 ("It is difficult to imagine a more necessary item of proof...."). A Title VI case challenging race discrimination in a hospital system that receives federal funds could not be presented effectively without calling a specialist in health planning. See Bryan v. Koch, 627 F.2d 612, 617-618 (2d Cir. 1980). A prisoner could not establish deliberate indifference in the maintenance of an inadequate health care

system without being able to present testimony of doctors and medical care delivery specialists. See Estelle v. Gamble, 429 U.S. 97 (1976); Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974). Expert witness testimony may be crucial to establish that the conduct of police officers deviates from accepted norms. Tennessee v. Garner, 471 U.S. ___, 85 L.Ed.2d 1, 14 (1985).

Cases under Title VII indicate the importance of expert testimony to the workings of that Act. It would be difficult for most plaintiffs to challenge a discriminatory employment test under Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), without the aid of an expert in test validation. Employment cases may present unusual issues of job relatedness requiring all manner of witnesses expert in the underlying

substance of the job. See Baker v. City of Detroit, 483 F. Supp. 919, 994-1000 (E.D. Mich. 1979). Even the ordinary class action employment discrimination case, whether under Title VII or 42 U.S.C. §1981, can rarely be brought without the use of a statistician. See Bazemore v. Friday, 478 U.S. _____, 92 L.Ed.2d 315, 329-31 (1986); Thornberry v. Delta Air Lines, 25 E.P.D. ¶31,496 (N.D.Cal. 1980); [28] Ste. Marie v. Eastern

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[28] In Thornberry, supra, the court noted that:

> [I]n the present case, as in much of today's Title VII litigation, the alleged discriminatory practices were not overt or de jure but if proved, would consist of subtle company policies.... In order to prove their prima facie case, and in particular, to rebut defendant's ... defense, plaintiffs' statistical case as developed through the use of computer experts would have been essential.

25 E.P.D. at 18, 990-996.

Railroad Assoc., 497 F. Supp. 800, 813-14 (S.D.N.Y. 1980) (personnel and statistical experts "essential"), rev'd on other grounds, 650 F.2d 395 (2d Cir. 1981); Bachman v. Pertschuk, 19 E.P.D. ¶9044 at 6508 (D.D.C. 1979) ("preparation of this case surely required such [statistical] analysis.").

CONCLUSION

The position of the en banc Fifth Circuit, erroneously eliding expert witness fees from the coverage of the Act, must be repudiated. It is contrary to the clearly expressed intent of Congress. It would have a devastating impact on the whole range of civil rights litigation. It would defeat the very purposes of the Act: To enable citizens to afford to vindicate their statutory and constitutional civil rights, to enable them to do so effectively, and to

attract competent counsel to the task.

The judgment of the court below should be affirmed, but for the reasons that Congress expressed when it passed the Act.

Respectfully submitted,

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